34765-6-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MEGAN LARES-STORM,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:

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1 W. LaFave, Search and Seizure s 3.3, at 509 (1978) 16

I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Should existing law be changed to require a warrant prior to permitting a canine sniff of a vehicle parked in a public lot? Was a sufficient *Gunwall* analysis performed where only two of six factors were discussed?

2. Should the Court review a challenge to the warrant made for the first time on appeal and, therefore, lacking a sufficient record for review? Does the record sufficiently establish the K-9's reliability where the affidavit in support of the search warrant demonstrated the certification and training of the K-9 as well as performance of over 400 applications where controlled substances were discovered or odors of controlled substances were present?

IV. STATEMENT OF THE CASE

The Defendant Megan Lares-Storm has been convicted at a stipulated facts trial of possession of methamphetamine with intent to deliver and use of drug paraphernalia. CP 6-7, 54-57. In pretrial motion, the Defendant challenged whether there was probable cause for the issuance of the search warrant. CP 12. She appeals from the suppression ruling. CP 73.

The facts presented at the CrR 3.6 hearing are not in dispute. CP 50-52; RP 4, 6-7, 11.

In the spring of 2016, the City Drug Unit had been receiving information that the Defendant was selling methamphetamine, driving a 2005 black Chevy Malibu with plates AWN-4415, and staying with Donnie Demoray at 430 E. Oak Street in Walla Walla. CP 36. Although the car is registered to Ines Moreno, police had never located the vehicle parked at Ms. Moreno's home. *Id.* Instead, police were seeing the car parked near Mr. Demoray's residence. *Id.* They did not attempt to contact the Defendant at the residence, being familiar with Mr. Demoray and believing that he would hide her from police. CP 36-37

On February 25, 2016, an informant conducting a controlled drug buy identified her as the driver of the vehicle and the person who sold him

methamphetamine. CP 36.

In mid-March, the Department of Corrections (DOC) had been looking for the Defendant for violating her probation. *Id.* They had seen her driving this car about town, but she crossed into Oregon before law enforcement could arrive to arrest her. *Id.*

On March 30, 2016, Walla Walla police detective Harris located the parked Malibu, which he knew to be associated with the Defendant. CP 51. He confirmed that there was a DOC warrant for her arrest. CP 51. He waited to see if the Defendant was inside the car, and he watched her exit the car and enter a residence. CP 51. She returned to her car with a bag and backpack and drove away. CP 51. He called for backup and then followed her to a TAJ gas station and convenience store where she parked. CP 51.

WWPD Ofc. Henzel arrived, parked behind the Defendant, and arrested her on the warrant. CP 51. She was alone in her car. CP 52.

WWPD Ofc. Fulmer responded to the TAJ parking lot with his K-9 partner, Pick. CP 33, 52. This was a public parking place. CP 52. The K-9 is trained to alert to the presence of cocaine, methamphetamine, and heroin and has been certified for this detection in conjunction with her handler Ofc. Fulmer. CP 33, 52. The K-9 sniffed the exterior of the car and alerted on the

driver door handle and door seam, detecting the scent of a controlled substance coming from within the Defendant's car. CP 27, 52-53.

The detective applied for a search warrant for the Defendant's car. CP 52. In the application, he described the canine sniff, the Defendant's known prior drug criminal history, and the detective's observations during the February controlled drug buy. *Id.* During that operation, the detective observed the Defendant's car arrive at a pre-arranged drug buy location in Walla Walla. CP 36, 50. Someone exited the car and delivered methamphetamine to the informant. *Id.* The informant was shown a photo of the Defendant later that day. *Id.* The informant "could not say for sure the driver was Ms. Lares-Storms but said he/she felt that was the female driving the vehicle that day." CP 50-51.

The application for the warrant detailed the training for K-9 Pick and her handler and described the alerting behavior. CP 31-34. It detailed the handler's experience in locating and identifying drugs and drug paraphernalia. CP 32-33. A K-9 will be trained young and retire after a handful or years or so. CP 31 (describing Rev's retirement after 6 ½ years of service), 33 (Pick is a 2 year old female black lab who has completed a 16 week course of training and then 200 hours with handler Ofc. Fulmer before

certification). Certification is annual and was attached to the warrant application. CP 33, 35. Pick, together with her handler, is employed by the Washington and Oregon state patrols, two county sheriff's offices, two city police departments, the state penitentiary, the DEA, and the FBI. CP 34.

Based on these facts, the court concluded that the canine sniff was not a search and that there was probable cause for the search warrant. CP 52-53. The court found the evidence located in the car (methamphetamine and drug paraphernalia) to be admissible. *Id.*

V. ARGUMENT

A. THE CANINE SNIFF OF A CAR PARKED IN A PUBLIC LOT WAS NOT A SEARCH.

The Defendant acknowledges that under the federal constitution, it is decided law that a canine sniff of a vehicle during a lawful traffic stop does not implicate legitimate privacy interests protected by the Fourth Amendment. BOA at 9 (citing *Illinois v. Caballes*, 543 U.S. 405, 408-10, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005)). The Defendant notes that case law in Washington also has decided the issue. BOA at 12 (citing *State v. Hartzell*, 156 Wn. App. 918, 237 P.3d 928 (2010)). *See also State v. Mecham*, 186 Wn.2d 128, 147, 380 P.3d 414 (2016) (favorably referencing

Hartzell for the proposition that a "canine sniff outside of car window is not a search because suspects have no reasonable expectation of privacy in air outside a car window").

The *Hartzell* case held that a canine sniff of the exterior of the defendant's car door parked in a private driveway did not unreasonably intrude into his private affairs. *Hartzell*, 156 Wn. App. at 927-30. It relied upon *State v. Boyce,* 44 Wn.App. 724, 729-30, 723 P.2d 28 (1986) (a canine sniff from an area where the defendant does not have a reasonable expectation of privacy and which is itself minimally intrusive is not a search). And other cases have similarly held that a warrant is not required prior to a canine sniff. *State v. Stanphill,* 53 Wn. App. 623, 769 P.2d 861 (1989) (no warrant required for a canine to smell a package at post office); *State v. Boyce*, 44 Wn. App. 724, 723 P.2d 28 (1986) (no warrant required for a canine to smell a safety deposit box at bank); *State v. Wolohan*, 23 Wn. App. 813, 598 P.2d 421 (1979), *review denied*, 93 Wn.2d 1008 (1980) (no warrant required for a canine to smell a parcel in bus terminal).

Despite this significant body of case law, the Defendant argues that the question has not been adequately considered. She asks this Court to reconsider whether the Washington constitution is more protective than the

federal constitution, specifically so as to require a warrant prior to a canine sniff of vehicles parked in a public lot. BOA at 9.

When a party asserts that the State Constitution should be considered as extending broader rights to its citizens than the does the United States Constitution, that party must provide a *Gunwall* analysis. *State v. Mason*, 127 Wn. App. 554, 570, 126 P.3d 34 (2005). It must analyze:

> (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.

State v. Gunwall, 106 Wn.2d 54, 58, 720 P.2d 808, 811 (1986).

> Four of the six factors require a review of the language and structure of the constitution from the viewpoint of the ratifying citizenry. The remaining two factors look to post-adoption events, but always with an eye to maintaining the rights as originally established against changed expectations.

Brief of Amicus Curiae Washington Association of Prosecuting Attorneys at 6, 2011 WL 1785227, *State v. Snapp*, 174 Wn.2d 177, 275 P.3d 289 (2012).

The Defendant's brief fails to address all the *Gunwall* factors, discussing only the two factors regarding post-adoption events.

The Defendant notes that Washington rejects an automobile exception to the Warrants Clause. BOA at 11 (citing *State v. Snapp*, 174 Wn.2d 177,

194, 275 P.3d 289 (2012); *State v. Tibbles*, 169 Wn.2d 364, 369, 236 P.3d 885 (2010)). But here the car was not subject to a warrantless search.

The Defendant notes that Washington rejects sobriety checkpoints. BOA at 11 (citing *City of Seattle v. Mesiani*, 110 Wn.2d 454, 456-58, 755 P.2d 775 (1988)). And here, the car was not stopped. It was already parked at the time of contact. A valid arrest warrant was executed and a valid search warrant was obtained for the parked car.

The Defendant notes that Washington rejects pretextual stops. BOA at 11-12 (citing *State v. Ladson*, 138 Wn.2d 343, 352-53, 979 P.2d 833 (1999)). Here there is no claim of a traffic stop. The Defendant was already parked. There is no claim of a pretext in the arrest. Law enforcement had been trying to arrest her on a warrant for weeks. Nor is there a claim that the sniff was pretextual. The detective obtained a warrant based on probable cause before entering the car. In his affidavit, he made no bones that he was looking for exactly what he found.

The Defendant argues that the odor emanating from a car parked in a public lot is a "private affair." BOA at 13. WAPA has conducted a historical analysis of the text and discovered that: "When Const. art. I, § 7 was adopted in 1889, the phrase 'private affairs' was understood to mean a person's papers

and business affairs." Brief of Amicus Curiae Washington Association of Prosecuting Attorneys at 7, 2011 WL 1785227, *State v. Snapp*, 174 Wn.2d 177, 275 P.3d 289 (2012). This means that there is no textual difference between the Washington and federal constitution as to this provision to support an interpretation that Washington drafters intended extra protections of privacy. *Id.* at 8. There is a structural difference in that the Declaration of Rights is given primacy of position in the Washington constitution. *Id.* at 9.

A dog's nose is not a recent technological advance.

> The olfactory abilities of dogs have been recognized throughout recorded history. Dogs have long been used in law enforcement to track criminals. They have also been used to track fugitives of all kinds, whether soldiers, rebels, or escaped slaves. *See State v. Hall*, 4 Ohio Dec. 147 (Com. Pleas 1896) (discussing history of tracking by bloodhounds). The citizens of Washington Territory and early Washington State were doubtless aware of these facts. They knew that dogs could be used to discover things and people that were hidden. They knew that this ability had historically been used as an instrument of government by beneficent and tyrannical rulers alike.
>
> Had the people considered this to be a threat to their privacy or liberty, they would have taken steps to protect themselves against it, whether by statute or case law.
>
> There is, however, no evidence of any such protection for a century after the Washington Constitution was adopted. There are and have been numerous statutes dealing with dogs. [...] There is, however, not a single statute that seeks to protect citizens from the use of dogs' olfactory abilities.
>
> Nor is there any early case law recognizing such protection. Until 1979, it does not appear that anyone even

> suggested that the use of a dog's nose constituted an invasion of privacy. That year, the Court of Appeals held in *Wolohan* that the use of a dog to smell luggage in a public place did not violate any legitimate expectation of privacy. During the next 10 years, the court twice reached similar conclusions, in *Boyce* and *Stamphill*. It was not until 1998 that a court first reached a contrary conclusion in *Dearman* -- almost 20 years after the issue was first raised in Washington, and almost 100 years after the Washington constitution was drafted.
>
> This history demonstrates that protection against a dog's sense of smell is not part of the "privacy interests which citizens of this state have held ... safe from governmental trespass absent a warrant." Rather, dogs have long been a routine and legitimate tool of law enforcement. The citizens of Washington have apparently believed that the natural and inherent limitations on a dog's abilities constitute a sufficient protection for their privacy.

Pamela B. Loginsky, Confessions, Search, Seizure, and Arrest: A Guide for Police Officers and Prosecutors, Washington Association of Prosecuting Attorneys (May 2015), 319-20.

When warned of bomb threats at a school or sports arena but lacking particularity as to the vehicle, law enforcement will conduct canine sniffs of vehicles in a parking lot. This is not offensive to the right of privacy, because a sniff of a vehicle in a public place is not intrusive. *United States v. Place*, 462 U.S. 696, 707, 103 S. Ct. 2637, 2644, 77 L. Ed. 2d 110 (1983) (A "canine sniff" is much less intrusive than a typical search; it does not require opening luggage or exposing noncontraband items that otherwise would

remain hidden from public view; and it only discloses the presence or absence of contraband); *State v. Young*, 123 Wn.2d 173, 188, 867 P.2d 593, 600 (1994) ("a dog sniff might constitute a search if the object of the search or the location[1] of the search were subject to heightened constitutional protection").

> Dogs are entirely different from modern surveillance tools, such as thermal imagers. [...] Although dogs can be trained to respond to different odors, their inherent abilities have not changed and are not likely to. The information that a dog can obtain is extremely limited:
>
> > The use of trained dogs to detect the odor of marijuana poses no threat of harassment, intimidation, or even inconvenience to the innocent citizen. Nothing of an innocent but private nature and nothing of in incriminating nature other than the narcotics being sought can be discovered through the dog's reaction to the odor of the narcotics.
>
> *Wolohan*, 23 Wn. App. at 820, *quoting People v. Campbell*, 67 Ill. 2d 308, 367 N.E.2d 949, 953-54 (1977), *cert. denied*, 435 U.S. 942 (1978).

Confessions, Search, Seizure, and Arrest at 320.

A dog's nose is comparable to a flashlight in that it is a common enough tool used to enhance a person's ability to sense from a lawful vantage point. *State v. Rose*, 128 Wn.2d 388, 909 P.2d 280 (1996) (flashlight view

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[1] It is the heightened constitutional protection of a home which justifies the holding in *State v. Dearman*, 92 Wn. App. 630, 635, 962 P.2d 850 (1998). Insofar as the opinion suggests that a dog's nose pierces the solid walls of a home like an infrared device, this is not the science. The dog smells particles (the odor) in the public domain which *emanate from* the home.

through a window into a mobile home is not an unconstitutional search). What the dog smells are particles (the odor) in the public domain which *emanate from* the car.

The Defendant notes that the Washington Supreme Court's analysis under article 1, section 7 frequently disregards reasonable expectations of privacy. This does not mean reasonableness does not enter into a *Gunwall* analysis, but only that the rule resulting from such an analysis will be a bright line. *State v. Eisfeldt*, 163 Wn.2d 628, 638, 185 P.3d 580 (2008). The Defendant's argument does not justify a reversal of a significant body of case law on a matter (canine sniffs) that has been in existence since the writing of the State constitution.

B. THE CHALLENGE TO THE K-9'S RELIABILITY HAS NOT BEEN PRESERVED FOR REVIEW.

The Defendant challenges the reliability of the K-9 as an informant under *Aguilar-Spinelli*. BOA at 17. This matter was not raised below so as to be preserved for appeal. CP 9-15. It is waived. *State v. Lee,* 162 Wn.App. 852, 856-57, 259 P.3d 294 (2011), *review denied,* 173 Wn.2d 1017 (2012); *see also State v. Tarica,* 59 Wn.App. 368, 372, 798 P.2d 296 (1990), *overruled on other grounds by State v. McFarland,* 127 Wn.2d 322, 899 P.2d

1251 (1995).

There is an exception if the Defendant can demonstrate the following four conditions are met:

> (1) a court issues a new controlling constitutional interpretation material to the defendant's case, (2) that interpretation overrules an existing controlling interpretation, (3) the new interpretation applies retroactively to the defendant, and (4) the defendant's trial was completed prior to the new interpretation.

State v. Robinson, 171 Wn.2d 292, 305, 253 P.3d 84, 89 (2011). The Defendant does not allege, and there is not, this exception here.

This Court may not reach the merits of this claim, however, the State will note that it is without merit.

The Defendant states that there was "no evidence of [K-9 and K-9 handler's] performance history." BOA at 20. Yet the Defendant acknowledges that K-9 Pick with Ofc. Fulmer has performed over 400 applications where controlled substances were discovered or the odors of controlled substances were present. BOA at 21; CP 33. The affidavit explains that the K-9 handler has assisted in executing search warrants and found both drugs and drug paraphernalia. CP 32. This is performance history.

The Defendant misstates the law, arguing that, "[a]bsent [a track record of a dog's false positives and false negatives], it is impossible to assess reliability." BOA at 24. No authority requires that an affidavit which relies upon a canine sniff provide a history of false positives and false negatives. Several courts have held that certification that a dog has been trained is prima facie proof of the dog's reliability which may be rebutted by the presentation of the dog's performance or training. *United States v. Hill,* 195 F.3d 258, 273 (6th Cir.1999); *United States v. Diaz,* 25 F.3d 392, 395 (6th Cir.1994); *Warren v. State,* 561 S.E.2d 190, 194-95 (Ga. App. 2002); *Dawson v. State,* 518 S.E.2d 477, 481 (Ga. App. 1999). K-9 Pick's reliability has not been rebutted.

Insofar as the Defendant would require a recitation of so-called false positives and false negatives, the Defendant provides no expert testimony justifying the utility or meaning of such information or even whether it can be gathered. This further underscores the need for a timely objection and the creation of a record at the trial level.

A false negative would only mean that the dog failed to detect the presence of a drug. This regards the sensitivity of the dog's nose, not its

reliability. A K-9 that fails to detect 35 pounds of marijuana submerged in gasoline within a gas tank[2] is not a concern for a magistrate or a defendant.

An alert where no drugs are recovered cannot be termed a "false positive." A dog alerts to a scent. *Matheson v. State*, 870 So. 2d 8, 12 (Fla. Dist. Ct. App. 2003). The absence of contraband does not indicate the absence of the scent. A dog's nose is more sensitive than scientific equipment. It may detect what we cannot. *Harris v. State*, 71 So. 3d 756, 763, 769 (Fla. 2011) ("The presence of a drug's odor at an intensity detectable by the dog, but not by the officer, does not mean that the drug itself is not present.") ("an alert to a residual odor is different from a false alert"). Insofar as the concern is that dogs are "too good" at their job (BOA at 23), this does not speak to their reliability so much as to the weight which a magistrate may give an alert. A dog may alert to an odor when the substance which left the odor is long gone or present in an inconsequential amount. However, the bar for issuance of a warrant is mere probable cause.

The case which the Defendant relies upon has been withdrawn. *Harris v. State*, 71 So. 3d 756, 767 (Fla. 2011), *as revised on denial of reh'g* (Sept. 22, 2011), *rev'd*, 568 U.S. 237, 133 S. Ct. 1050, 185 L. Ed. 2d 61

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[2] Peter Tyson, Dog's Dazzling Sense of Smell, NOVA Science Now (October 4, 2012) (providing anecdote of such a detection). http://www.pbs.org/wgbh/nova/nature/dogs-sense-of-smell.html .

(2013), and *opinion withdrawn*, 123 So. 3d 1144 (Fla. 2013). The Tennessee opinion only states that a magistrate "may" consider the dog's track record of false alerts in making a reliability determination. *State v. England*, 19 S.W.3d 762, 768 (Tenn. 2000).

The existing law is simply that an affidavit should provide information of the underlying circumstances by which the affiant concluded that the informant was credible and that the information was reliable. *State v. Partin*, 88 Wn.2d 899, 567 P.2d 1136 (1977). There is no single way by which reliability may be shown. While it is not enough to provide the affiant's conclusion that the informant was credible, it is almost universally held to be sufficient if information has been given which has led to arrests and convictions. *State v. Fisher*, 96 Wn.2d 962, 965, 639 P.2d 743, 745-46 (1982) (citing 1 W. LaFave, Search and Seizure s 3.3, at 509 (1978)).

A police officer informant is accorded greater reliability than a criminal informant. An officer is trained and regularly certified in order to maintain employment. A citizen informant or police officer, as opposed to a criminal informant or an anonymous tipster, is presumptively reliable. *State v. Gaddy*, 114 Wn. App. 702, 707, 60 P.3d 116, 120 (2002), *aff'd*, 152 Wn.2d 64, 93 P.3d 872 (2004).

The Defendant is arguing for a change in law premised on a withdrawn Florida opinion. The challenge is not preserved for review.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: July 31, 2017.

Respectfully submitted:

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Lila J. Silverstein lila@washapp.org	A copy of this brief was sent via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED July 31, 2017, Pasco, WA **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**

July 31, 2017 - 12:04 PM

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Filed with Court:	Court of Appeals Division III
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Appellate Court Case Title:	State of Washington v. Megan Cherisse Lares-Storms
Superior Court Case Number:	16-1-00145-6

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